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No. 1043

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

JERRY M. COHEN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

JERRY M. COHEN, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Jerry M. Cohen petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause on December 18, 1968.

OPINION BELOW

The Opinion of the Court of Appeals (App. 1) is not yet officially reported but is unofficially reported at 23 A.F.T.R. 2d par. 69-303, Prentice-Hall, Federal Taxes.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 18, 1968 (App. 2). On January 14, 1969, this Court, Mr. Justice Byron R. White, entered an order granting Petitioner an extension of time until February 16, 1969, within which to file a Petition for Writ of Certiorari. (App. 3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court had jurisdiction under 18 U.S.C. § 3231.

QUESTION PRESENTED

Petitioner Jerry M. Cohen was convicted of filing fraudulent employment tax returns and failure to file personal income tax returns. The evidence used to convict him was obtained solely from his personal books and records. In order to obtain access to these books a Special Agent of the Internal Revenue Service requested Petitioner to turn them over to a Revenue Agent of the field audit group who, he said, was making an audit to determine if any tax liability were owing. In fact, the case had already been assigned to the Special Agent (Criminal Investigator) and the books nominally procured by the Revenue Agent for his "audit" were instead used by the Special Agent to prepare a criminal prosecution. The Special Agent obtained Petitioner's books and records via the Revenue Agent and also obtained critical oral admissions from Petitioner prior to offering any warning to Petitioner regarding the criminal nature of the investigation or his rights as a criminal suspect.

The question presented is: Whether evidence to convict for federal tax violations can be obtained by a Special Agent under the guise that the purpose for

obtaining the records was to have a Revenue Agent conduct an audit when the real purpose for obtaining the records was the Special Agent's criminal investigation, and whether Petitioner was, under the circumstances, required to be warned of his rights as a criminal suspect.

STATEMENT

1. Proceedings Below

Petitioner waived jury trial and a trial to the Court was held on January 2, 1968. On January 18, 1968 the Court found Petitioner guilty of all eleven counts of the indictment. Petitioner was sentenced under all counts to a consecutive total of three years imprisonment and a cumulative total fine of $5,000.

Prior to trial Petitioner had moved to suppress certain evidence and a hearing was held and testimony was taken in support of his Motion on May 19, 1967. The Motion was overruled.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit which affirmed the Judgment of conviction of the District Count on December 18, 1968.

2. The Evidence Obtained by the Special Agent

On September 9, 1963 Special Agent Carl Heinz, who had been with the Intelligence Division of the Internal Revenue Service for 22 years, visited Petitioner's place of business in the company of a field

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[1] The designation "M." refers to the transcript of the hearing on Petitioner's Motion to Suppress. The designation "Tr." refers to the transcript of the trial.

audit Revenue Agent, Edwin L. Reising (M.17-19).[1] At this meeting Petitioner was alone with the two agents (M.2). Prior to this meeting the Internal Revenue Service had determined that Petitioner had not filed income tax returns for the years in question and Petitioner's case had already been referred to and accepted by the Intelligence Division of the Internal Revenue Service and had been assigned to Special Agent Heinz "as a criminal investigator" (M.6,7,37).

Petitioner's business was not incorporated but was operated as a sole proprietorship (M.16-17). In order to obtain Petitioner's books and records Special Agent Heinz told Petitioner at the September 9 interrogation that Revenue Agent Reising needed them to conduct an "audit" of Petitioner's tax liability "if any" (M.6; Tr. 20,49,50).

Special Agent Heinz and Revenue Agent Reising offered their Internal Revenue Service credentials to Petitioner at this meeting but did not explain that a Special Agent is a criminal investigator and did not advise Petitioner of his right to refuse to turn over his records or to refuse to answer interrogation (M.5; Tr. 38). He agreed to turn over the requested books and records to Revenue Agent Reising for an audit (M.7). In response to questions by Special Agent Heinz he admitted that he had not filed income tax returns for the years 1960, 1961 and 1962 (M.5; Tr. 38).

On September 26, 1963 Special Agent Heinz and Revenue Agent Reising revisted Petitioner's place of business and obtained Petitioner's sales ledger or journal and check stubs containing gross sales figures for the years 1960, 1961 and 1962 as well as the payroll records for these periods (M.8; Tr. 21, Tr. 39-41). It

was not until the fourth[2] interrogation of Petitioner, on June 3, 1964, that Special Agent Heinz gave any form of warning to Petitioner. At that meeting he asked why Petitioner had not filed returns and told him that he did not have to answer because it might involve his constitutional rights (Tr. 24).

Prior to obtaining Petitioner's records, Special Agent Heinz had not obtained any evidence that Petitioner had received $600 of taxable income in each of the years in issue which gives rise to the obligation to file a return. This evidence as well as evidence of a tax tax liability in each of those years used to show willfulness was obtained through these and certain additional records obtained from Petitioner by theSpecial Agent at a later date (Tr. 96-100).

On several additional occasions Special Agent Heinz and Revenue Agent Reising visited Petitioner and obtained records and statements from him (Tr. 42, 46, 47, 31, 51). On each of these occasions the receipt for the records was signed by Revenue Agent Reising (M.14, 15). However, on January 29, 1965 a requisition was made to obtain from Internal Revenue files Petitioner's employment tax returns for the years in issue. This purely internal requisition was signed by Special Agent Heinz (Tr. 99).

3. Interrogation in the Federal Building

On September 8, 1964, February 8, 1965, March 16, 1965, August 10, 1965, September 16, 1965, and April 6, 1966 Petitioner came to the Federal Building and fur-

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[2] The Court of Appeals Opinion inaccurately states that such a warning was given at the second interrogation (App. 1, p. 3). Meetings were held on September 9, 1963, September 26, 1963 and March 30, 1964, prior to the June 3, 1964 meeting at which the warning was given (Tr. 37, 39, 42, 46).

nished statements and additional records to Special Agent Heinz. (Tr. 30, 31, 42, 46, 47, 51, 91).

No warnings at all were given Petitioner at the September 8, 1964, February 8, 1965, and March 16, 1965 meetings (Tr. 46).

At the August 10, 1965 meeting Special Agent Heinz advised Petitioner that he was not obligated to make any statement that might incriminate him. At this meeting Petitioner admitted that he understated amounts on his employment tax returns according to what he could pay (Tr. 30).

Petitioner was subjected to interrogation under oath in the Federal Building in the presence of acting supervisory Special Agent McGuire and was then advised for the first time that he had been the subject of a criminal investigation and that criminal prosecution had been recommended. Prior to this interrogation Petitioner had been advised by letter that he could bring an attorney (Tr. 32, 51, 91-94). At this interrogation Petitioner stated that his failure to file was due to carelessness and that the employment tax returns were understated in accordance with what he could pay. (Tr. 93-94).

4. The Court of Appeals Decision

The Court of Appeals held that "Internal Revenue Service Agents, Revenue or Special, are not required to warn taxpayers who are not in custody of their Fifth or Sixth Amendment rights (App. 2, p. 11). The Court then made the following statement (App. 2, p. 11).

> "We also reemphasize the views that we expressed in *Whit* that disclosures to Internal Revenue

> Service Agents, Revenue or Special, must be entirely voluntary and must not be induced by coercion, fraud or mispresentations."

Despite this reference to the basic principle on which this Petition is based, the Court of Appeals misunderstood the text and the import of the Special Agent's misrepresentations. The Court recited the following inaccurate summary of the Agents' testimony (App. 2, p. 2):

> "The Special Agent then told the defendant that a Revenue Agent had been assigned to 'examine his income tax liability, if any,' and that the Revenue Agent would make the tax examination, and that he, *the Special Agent,* would conduct an audit." [Emphasis supplied].

This summary is contrary to the testimony, contrary to Internal Revenue practices, and contrary to both Petitioner's and Respondent's version of this testimony. (See Brief of Appellant, p. 3; Brief for the Appellee, p. 9). The Special Agent testified that Revenue Agent Reising had been assigned to "examine his income tax liability, if any" (Tr. 20) and "then he'd conduct the audit." (Tr. 49-50). The Court thought that the "he" referred to was Heinz, overlooking that it was Heinz who was then testifying and who had used the word referring to Reising.

The Court of Appeals not only mistook the statements made by the Special Agent, but also believed that its incorrect version of this crucial testimony constituted a true statement by the Agent.

The Court noted with respect to Petitioner's admission on September 9, 1963, that he had not filed returns for the years in issue that "This was the first time

that the Special Agent knew that no returns had been filed." (App. 2, p. 2).

Yet the Special Agent had testified that prior to September 9 an investigation had revealed that this St. Louis resident had filed no tax returns in St. Louis, and the case had already been referred to and accepted by the Intelligence Division and assigned to the Special Agent "as a criminal investigator."

The Court of Appeals' belief in the truth of the statement that a Special Agent of the Internal Revenue Service was seeking records in order to conduct an audit not only is contrary to the Special Agent's own testimony that he was acting as a "criminal investigator," but it is contrary to his very title as disclosed by the Revenue Agent's manual—"Special Agent (Criminal Investigator)." See *United States* v. *Sclafani,* 265 F.2d 408, 414 (C.A. 2d 1959), certiorari denied, 360 U.S. 918 (1960).

The same Official Manual discloses that in an Intelligence Division and Audit Division joint investigation such as this, the Internal Revenue Service looks to the Special Agent solely for criminal investigation and to assemble proof to establish a charge. See *United States* v. *Wolrich,* 119 F.Supp. 538 (S.D.N.Y. 1954).

REASONS FOR GRANTING THE WRIT

This case presents an important question of federal law which has not been, but should be, settled by this Court—whether Special Agents of the Intelligence Division may misrepresent to a suspect that his personal records are sought for the use of a Revenue Agent in conducting a customary audit to determine tax liability when the real purpose for obtaining the

records is to enable the Special Agent to conduct a criminal investigation. The issue is additionally of great importance in the administration of such investigations and is currently the subject of a serious and growing conflict between District Courts and Courts of Appeals.

The crucial importance of the Special Agent's misstatements is that when they were made, he had not yet obtained any evidence that Petitioner had received taxable income in the statutory amount in the years he was investigating. The Special Agent was not entitled to use compulsory process, such as an administrative summons, to obtain these records since they were sought for criminal prosecution. *Reisman* v. *Caplin,* 375 U.S. 440 (1964); *United States* v. *Cohen,* 250 F.Supp. 472 (D.C. D.O. 1966).

Therefore, the Special Agent misrepresented the purpose for which the records were sought in order to keep Petitioner ignorant of the criminal nature of the investigation, for if he did not obtain the records from Petitioner, his investigation would have to be expanded and third party sources would have to be explored.

The Court of Appeals appears to have assumed—despite extensive brief and argument by Petitioner and Respondent on this subject—that Petitioner's records were genuinely sought to conduct a routine audit.

Yet these statements were palpably false and intended to mislead Petitioner. He claimed that the records were sought by Revenue Agent Reising. However, Special Agent Heinz was then conducting a criminal investigation, and it was he who needed the records since he had not yet completed his investigation or

made his recommendation. Reising testified he was merely assisting Heinz, who was a criminal investigator. (Tr. 95).

Special Agent Heinz also claimed that the Revenue Agent was conducting an "audit." But once a case is accepted for field investigation by the Intelligence Division any audit, even if one had started, is suspended[3]. In the case at bar, no "audit" had even begun.[4]

Numerous Courts of Appeals have held that records obtained during an examination honestly begun as a civil audit need not be excluded because the statement of the agent that the records were desired for an audit was not amended when he later found evidence of fraud, suspended the audit and referred the case to the Intelligence Division. *United States* v. *Frank,* 255 F.2d 284 (C.A. 3d 1957), certiorari denied, 355 U.S. 819 (1958); *United States* v. *Sclafani, supra; Turner* v. *United States,* 222 F.2d 926 (C.A. 4th 1955), certiorari denied, 350 U.S. 831 (1956).

The Court of Appeals decision in the case at bar stands alone for the proposition that records obtained

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[3] See *United States* v. *Dickerson,* decided October 25, 1968, not yet officially reported, 69-1 U.S.T.C. par. 9174, p. 83, 802 (N.D. Ill.) where, after the auditing agent was told defendant had not filed, he referred the case to the Intelligence Division and the Court found (p. 83, 803): "At this point, Petrovic had reason to believe that defendant had committed a criminal violation and, *pursuant to Internal Revenue Service regulations, suspended any further activity in his civil investigation* and referred the case to his superiors to determine if the case warranted criminal investigation. (Emphasis supplied.)

[4] As stated in Balter, *Tax Fraud and Evasion* (3rd Edition, 1963), Section 3.3-2, p. 3-15, after the point is reached when a Special Agent comes into a case "from that point on the investigation is in charge of the special agent and the work of the revenue agent is under his direction."

during an examination which is *begun* as a criminal investigation can be used even if the Special Agent misrepresented it as an "audit" by a Revenue Agent.

In reaching this result, the Court of Appeals for the Eighth Circuit necessarily rejected the following thesis:

> "(T)he law distinguishes between failure on the part of a government investigator to disclose the purpose of his investigation at its inception where suspicion of a criminal wrongdoing exists and the discovery of criminal wrongdoing in the course of a routine investigation. (*Wheeler* v. *United States,* 149 F. Supp. 445, 450 (W.D. Pa. 1957), reversed on other grounds, 256 F. 2d 745 (C.A. 3d, 1958).)

In *Wheeler* the Court held that the agent's statement that he was undertaking a routine tax investigation when, in fact, it was a mere pretext to look for evidence to support a criminal charge (p. 450) "constitutes a fraud and deceit on the taxpayer in violation of his constitutional rights and his right against self-incrimination."

The same view was taken in *United States* v. *Wolrich,* 119 F. Supp. 538 (S.D.N.Y. 1954). In *Wolrich* the Court had initially assumed that the Revenue Agent's statement that he was making a "routine audit" was correct and denied defendant's Motion to Suppress. On rehearing the Court received the Official Manual of the Revenue Agents in evidence and analyzed the nature and purpose of a Joint Investigation by a Special Agent and a Revenue Agent. The Court relied on the Official Manual and stated (p. 529): "From this it appears that a Joint Investigation is one that is initiated when *probable fraud* is indicated." (Emphasis supplied.) The Court vacated its earlier ruling denying the defendant's Motion and set the

case for a hearing to determine whether defendant was defrauded. See in accord *United States* v. *Avila,* 227 F. Supp. 3 (N.D. Calif. 1963) which held for the defendant where the agent pretended to be examining an unaudited year but actually examined an already audited year without first obtaining the statutory letter from the Commissioner permitting a reaudit. See also *United States* v. *Manno,* 118 F. Supp. 511 (N.D. Ill. 1954).

Also, in *United States* v. *Guerrina,* 112 F. Supp. 126 (E.D. Pa. 1953), modified, 126 F. Supp. 609 (1955), a Special Agent joined in the investigation from the beginning to obtain evidence for criminal prosecution but the examination was described to the defendant as an audit. The Court ruled for defendant. The Court considered the Eighth Circuit's 1950 decision in *Hanson* v. *United States,* 186 F. 2d 61 (C.A. 8th 1950) which had held for the government and distinguished *Hanson* stating (p. 130):

> The very factors referred to in that opinion as being lacking and which by implication were necessary to sustain the plea of the Fifth Amendment are present in this case.
>
> In the instant case we have the very frank testimony of Special Agent Pearson that he had reason to believe that the defendant had been guilty of fraud and that his purpose in making the examination of his papers was to obtain evidence for contemplated criminal prosecution. *With these different circumstances* I am of the opinion that the Court of Appeals for the 8th Circuit would have reached the conclusion that the defendant was entitled to a warning before the information could be said to have been obtained from the de-

> fendant without doing violence to his privilege under the Fifth Amendment. (Emphasis supplied.)

Such circumstances are also present in the case at bar, but the Court of Appeals has mistaken the critical testimony and viewed the case as one where the Agent's statement was true when made with suspicion of a criminal violation only arising later, when in fact the Agent's statement was false when made and, as suggested by the Court in *Guerrina,* the Court of Appeals for the Eighth Circuit should have recognized the distinction and reversed.

This Court in the recent case of *Mathis* v. *United States,* 391 U.S. 1 (1968), a case in which no affirmative misrepresentation was practiced by the agents, held that Internal Revenue Agents must give the plenary warnings required by *Miranda* v. *Arizona,* 384 U.S. 436 (1966) when a suspect is the subject of a criminal investigation which is in the accusatory stage if he is in custody or otherwise deprived of his freedom by the authorities in any significant way.

In the most recent reported decision on the obligation of criminal investigators of the Internal Revenue Service to warn suspects, the Court held that a defendant who was interrogated in the same fashion as Petitioner (but who apparently was not affirmatively misled as was Petitioner) had "his freedom of action curtailed in a very significant way" within the meaning of *Miranda* and *Mathis. United States* v. *Dickerson,* decided October 25, 1968 (not yet officially reported), 69-1 U.S.T.C., par. 9174, p. 83, 802 (N.D. Ill.) at p. 83, 303.

In *Dickerson* the Court cited with approval the law review commentary[5] and authority[6] that warnings are required which has continued to grow since this Court's *Mathis* decision. The Court refused to restrict *Miranda* to the jailhouse because of this Court's holding in *Miranda* (p. 436) that "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

The Court held that confinement in a jailhouse setting was the "obvious situation" but that defendant's freedom was significantly curtailed by the agents questioning, the absence of counsel, and the absence of sufficient warnings. (69-1 U.S.T.C., p. 83, 804-5).

Dickerson and the many other District Court cases are carefully considered, and masterful analyses of the major administrative and investigative problem posed by the continuing tactics of Special Agents. Those decisions are fully supported by this Court's language in *Miranda* and *Mathis* on which they rely. Their result continues to be supported, despite the contrary appellate authority, by numerous law review writers. And despite its efforts to save past convictions procured by such tactics, the Internal Revenue Service has it-

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[5] Andrews, The Right to Counsel in Criminal Tax Investigations Under *Escobedo* and *Miranda:* The Critical Stage, 53 Iowa L. Rev. 1074 (1968); See also articles cited in footnotes 3 and 8 of App. 2, pp. 2, 10.

[6] *United States* v. *Turzynski,* 268 F.Supp. 847 (N.D. Ill. 1967); *United States* v. *Kingry,* 67-1 U.S.T.C., par. 9262 (N.D. Fla. 1967); *United States* v. *Schoenberg,* 67-1 U.S.T.C., par. 9393 (D. Ariz. 1966); *United States* v. *Gower,* 271 F.Supp. 655 (M.D. Pa. 1967); *United States* v. *Harrison,* 265 F.Supp. 660 (S.D.N.Y. 1967); *United States* v. *Wainwright,* 284 F.Supp. 129 (D. Colo. 1968).

self, at long last, announced intended compliance with much of what is advocated by Petitioner,[7] though it still refuses to require its Special Agents to give the comprehensive *Miranda* warnings unless an arrest is made. Arrest, of course, virtually never occurs.

If this case presented only an opportunity to reconcile the continued conflicting views of the District Courts and the Courts of Appeals on the warning question, or only an opportunity to resolve the administrative ambivalence of the Internal Revenue Service, this Petition should readily be granted. But when these unresolved controversies touch the case of a suspect who was seriously misled in a way which will be repeated as long as present policies continue, consideration of the issue by this Court can wait no longer.

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[7] Internal Revenue Service News Release, IR-949, November 26, 1968:

"* * * At the initial meeting with a taxpayer, a Special Agent is now required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The Special Agent will also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.

"Previously, the Special Agent identified himself and described his function at the first meeting with the taxpayer but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage.

"IRS has made no change in its existing instructions that if it becomes necessary to interview a person who is in custody, an Agent must give a comprehensive statement of rights before any interrogation. This statement warns the person in custody that he may remain silent and that anything he says may be used against him.

"A person in custody also must be told that he has the right to consult or have present his own counsel before making a statement or answering any questions, and that if he cannot afford counsel he can have one appointed by the U.S. Commissioner."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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